

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Denise Winter,

Petitioner,

v.

Dakota County,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis at 10:00 a.m. on July 26, 2001, at the Hastings Veterans Home, Building 20, Resource Room #118, 1200 East 18th Street, Hastings, Minnesota. The Petitioner filed her post-hearing brief on August 17, 2001. The County filed its post-hearing brief on August 20, 2001. And the record closed on August 20, 2001.

George May, Attorney at Law, May & O'Brien Law Offices, 204 Sibley Street, Suite 202, Hastings, MN 55033, appeared on behalf of Denise Winter ("Petitioner"). Andrea White, Assistant Dakota County Attorney, Dakota County Justice Center, 1560 Highway 55, Hastings, MN 55033, appeared on behalf of Dakota County ("County").

NOTICE

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Veterans Affairs will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61 (2000), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Clint Bucher, Minnesota Department of Veterans Affairs, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155-2079, telephone (651) 297-5828 to inquire about filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether Dakota County violated the Minnesota Veterans Preference Act (Act) by failing to notify Petitioner of her score.
2. Whether Dakota County violated the Act by failing to properly score Petitioner's employment application and examination.
3. Whether Dakota County violated the Act by failing to notify Petitioner of the reasons for not hiring her.

4. What relief, if any, is appropriate.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner is the spouse of a disabled veteran.

2. On February 26, 2001, Petitioner submitted an employment application to Dakota County for an “office support” position.^[1] On her application, Petitioner indicated that she was applying for Veterans Preference points.

3. The County has four positions that fall within the “office support” job classification. These positions are office assistant, senior office assistant, office specialist, and administrative assistant.^[2]

4. The minimum qualification for an office assistant position is a high school diploma or equivalent. The minimum qualifications for a senior office assistant position are a high school diploma or equivalent, and one year of office services education or experience working directly with the public. The minimum qualifications for an office specialist position are a high school diploma or equivalent, plus two years of office services education or experience working directly with the public. The minimum qualifications for an administrative assistant position are a high school diploma or equivalent, plus three years of office services education or experience working directly with the public.^[3]

5. Included in the employment application materials was a skills assessment questionnaire. The questionnaire had 47 questions designed to elicit information about an applicant’s skills, education, training and experience. Written instructions on the questionnaire directed the applicant to mark the appropriate responses to the questions on an enclosed “scantron answer sheet”. The scantron answer sheet consisted of 100 lines with corresponding letters A – E representing the possible answers to be marked. Applicants are instructed at the end of the questionnaire to complete and return to the County the employment application and the answer sheet.^[4] Once received, the County scans the answer sheet into a computer, which assigns it a point value based on the responses. Because the questions are weighted, the score given does not necessarily reflect the number of questions answered.^[5]

6. The topics covered in the questionnaire included computer experience, educational qualifications, secretarial or accounting training, and general office support work experience. Many of the questions contained in the questionnaire required only “yes” or “no” answers.^[6]

7. The Petitioner answered approximately 35 of the 47 questions on the questionnaire.^[7]

8. Petitioner gave her application materials, including the answer sheet and the supporting Veteran’s Preference documents, to her aunt to submit to the Dakota County Employee Relations Department. Petitioner’s aunt is a Dakota County employee.^[8]

9. The County received Petitioner's application materials on February 26, 2001.^[9]

10. In February 2001, the County had approximately 15–20 vacant office support positions to be filled.^[10]

11. The County screens job applicants by determining first if the applicant meets the minimum qualifications for the position. If the applicant meets the minimum qualifications, the County ranks the applicant based on his or her assessment questionnaire or other examination score.^[11]

12. The answer sheet the County scored as Petitioner's had only 8 of the 47 questions answered.^[12] There was no name provided on the answer sheet. Instead, a Dakota County employee wrote in Petitioner's name on the line provided.^[13] Based on the 8 questions answered on the answer sheet, Petitioner received a raw score of 16. This score indicates that some of the 8 answers were worth more than one point. On average, each answer was worth two points.

13. The County converted Petitioner's raw score of 16 out of 47 to a 100-point rating system in order to assign Veterans Preference points. Based on the County's conversion, Petitioner received a score of 8.7 on a 100-point scale, which the County rounded up to 9. The County also gave Petitioner 10 Veterans Preference points based on her status as the wife of a disabled veteran. Petitioner's final total score was 19 on a 100-point scale.^[14]

14. The County uses a computer program to convert employment examination scores to a 100-point scale. There was no evidence presented to explain how a raw score of 16 out of 47 was reduced to 9 when converted to a 100-point scale.^[15]

15. Based on the assessment questionnaire scores, the County ranks applicants as "Qualified", "Well Qualified" or "Extremely Well Qualified". Applicants who receive a score within the range of 66 to 100 are considered "Extremely Well Qualified". Applicants with scores between 33 to 65 are considered "Well Qualified". And applicants who receive a score of 1 to 32 are considered "Qualified". The County ranked Petitioner as "Qualified" based on her assessment score of 19.^[16]

16. The County places the top scoring applicants on a "certified list" to be selected for interviews as employment vacancies occur. The higher an applicant's score, the more likely that applicant will be certified and selected for an interview.^[17]

17. By letter dated March 14, 2001, the County informed Petitioner that her application materials had been received and scored. The County explained that based on her "Office Support Assessment Questionnaire" score, Petitioner was deemed "Qualified" for the Office Assistant and Senior Office Assistant positions. The County further determined that Petitioner did not meet the minimum qualifications for the Office Specialist and Administrative Assistant positions.^[18] The letter did not notify Petitioner of her numerical score or of the number of Veteran's Preference points she was awarded.

18. Based on her score of 19, Petitioner was not placed on a certified list and was not selected for an interview.^[19]

19. After receiving the County's March 14th letter, Petitioner called the number listed for the County's Employee Relations Department. Petitioner spoke to the receptionist and explained that she had submitted an application for an office support position and wanted to know her final score. The receptionist told Petitioner that she could not give out that information over the telephone.^[20]

20. After talking to the receptionist, Petitioner went to the County's Employee Relations Department to find out her score and whether she was awarded Veterans Preference points. Petitioner met with Ms. Trixie Harris, a Senior Associate in the Employee Relations Department.^[21] Petitioner asked Ms. Harris whether she had been credited Veterans Preference points on her recent application. After checking the computer, Ms. Harris told Petitioner that she had been awarded Veterans Preference points.^[22] But Ms. Harris was unable to tell Petitioner what her score was on a 100-point scale. During their discussion, Petitioner handed Ms. Harris a copy of a brochure explaining veterans preference in federal employment for spouses of disabled veterans.^[23] Ms. Harris told Petitioner that she would contact the Minnesota Veterans Affairs Department to clarify the Act's requirements.^[24]

21. In a subsequent telephone conversation, Ms. Harris told Petitioner that the Veterans Preference Act brochure Petitioner showed her governed federal agencies and did not apply to county departments. Ms. Harris also explained that the county did not have a 100-point system. Instead, the County ranked applicants as "Qualified", "Well-Qualified" or "Extremely Well Qualified".^[25]

22. On April 18, 2000, Petitioner filed a petition for relief under the Veterans Preference Act with the Department of Veterans Affairs.^[26]

23. On July 25, 2001, a day before the hearing in this matter, the County informed Petitioner that her score was 19 on a 100-point rating system.^[27]

24. Petitioner is currently employed as a school bus driver.^[28]

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minnesota Statutes §§ 14.50 and 197.481 (2000).

2. The Petitioner is the spouse of a disabled veteran within the meaning of Minn. Stat. § 197.46 and 197.447 (2000).

3. Dakota County is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.46 (2000).

4. The Petitioner has the burden of proof to establish by a preponderance of the evidence that she was denied her rights under the Veterans Preference Act, Minn. Stat. § 197.46.^[29]

5. The provisions of Minn. Stat. § 43A.11 granting preference to veterans in the state civil service shall also govern preference of a veteran under the civil service laws, charter provisions, ordinances, rules or regulations of a county.^[30]

6.Minn. Stat. § 43A.11, subds. 4 and 6 (2000) grants to spouses of disabled veterans a preference in governmental employment through the addition of ten points to the individual's competitive open examination rating.

7.As the spouse of a disabled veteran, Petitioner was properly awarded 10 points to her final skills assessment score.

8.Pursuant to Minn. Stat. § 43A.11, subd. 8 (2000), a governmental agency is required to provide applicants who have passed examinations with their final examination ratings preference credits.

9.The County failed to provide Petitioner with her final examination ratings preference credits when it notified Petitioner of her ranking for the office support positions in violation of Minn. Stat. § 43A.11, subd. 8 (2000).

10. Political subdivisions are required to adapt their hiring systems to a 100-point rating system to enable uniform application of veterans preference points.^[31]

11. Petitioner has established by a preponderance of the evidence that the County identified the wrong answer sheet as hers and consequently assigned her the wrong score on the assessment questionnaire.

12. Even if the answer sheet identified as Petitioner's was the one Petitioner filled out and submitted, the County has failed to establish how or why it apparently reduced Petitioner's raw score of 16 out of 47 to 9 when it converted her score to a 100-point rating system.

13. Petitioner has established by a preponderance of the evidence that the County violated her rights under Veterans Preference Act, when it failed to adapt her score properly to a 100-point rating system, and when it failed to show her final examination ratings preference credits when it notified her of her "Qualified" ranking.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

1. That the Commissioner of Veterans Affairs issue an Order requiring Dakota County to recompute the Petitioner's assessment score and ranking, after allowing the Petitioner to retake the office support skills assessment questionnaire for consideration and scoring for future office support positions.
2. That the Commissioner of Veterans Affairs issue an Order requiring Dakota County to review for accuracy its program for converting employment and assessment examination scores to a 100-point rating system.

Dated this _12th__ day of September 2001.

RICHARD C. LUIS

Administrative Law Judge

Reported: Tape-recorded (2 tapes).

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Pursuant to the Minnesota Veterans Preference Act, public employers are required to add veterans preference credit points to a veteran's competitive open examination rating. Non-disabled veterans are to be given five additional points on their competitive open examination ratings and disabled veterans are to be given ten additional points.^[32] This preference in governmental employment is also available to a spouse of a disabled veteran if the veteran is unable to qualify because of the disability.^[33]

Petitioner is the spouse of a disabled veteran. She applied for an office support position with the County and was ranked in the bottom third of the applicants. Minn. Stat. § 43A.11, subd. 8 requires government agencies when notifying applicants that they have passed examinations "to show the final examination ratings preference credits". In March, the County notified Petitioner by letter that she had placed in the "Qualified" category for office support positions. The County maintains that an applicant's category is her "final score" for purposes of Minn. Stat. § 43A.11, subd. 8. Accordingly, the County contends that by informing Petitioner of her "Qualified" ranking, it fully complied with the requirements of Minn. Stat. § 43A.11.

Minn. Stat. § 43A.11, subd. 8 requires the County to provide Petitioner with her veterans preference credits and arguably her final examination score. In notifying Petitioner that she had been placed in the "Qualified" category, the County failed to provide her with her veterans preference credits in violation of Minn. Stat. § 43A.11, subd. 8 (2000). The County also did not provide Petitioner with her final numerical score or rating. And when the Petitioner met with the County's Employee Relations Department staff to inquire about her score and veterans preference credits, the County was still unable to provide Petitioner with a final score. In fact, the County's senior associate, Trixie Harris, who met with the Petitioner, was apparently unaware that the Veterans Preference Act applied to county departments. Despite Ms. Harris' confusion, it was determined that Petitioner was properly awarded 10 veterans preference points as the wife of a disabled veteran.

In addition to the County's failure to notify Petitioner of her preference credits, the Administrative Law Judge is persuaded by Petitioner's testimony that the scantron answer sheet identified as County's Exhibit 4 was not the answer sheet Petitioner provided with her application materials. Petitioner testified that her name and her social security number were written on Exhibit 4 in handwriting other than her own. The County does not dispute that one of its employees may have written Petitioner's name on the answer sheet.^[34] Petitioner also remembers answering many more of the 47

questions than the 8 provided on Exhibit 4. The ALJ finds Petitioner to be credible on this issue and is persuaded that the County misidentified Exhibit 4 as Petitioner's answer sheet.

The ALJ rejects the County's argument that the issue of the misidentified answer sheet was improperly raised at the hearing because it was not included in Petitioner's Petition for Relief. The petition, which was filed on April 18, 2001, put the County on notice that the Petitioner was challenging her "qualified" ranking and requesting a breakdown of her score and credits received. The County did not object during the hearing when Petitioner challenged the identity of the answer sheet. Nor did the County ask for a continuance in order to prepare to meet any new facts presented by this challenge. Moreover, the rules of the Office of Administrative Hearings provide that a party may amend its notice of hearing at any time prior to the close of the hearing provided that the parties have a reasonable time to prepare to meet any new issues or allegations made.^[35] The ALJ concludes that the County had adequate opportunity at the hearing and in its post-hearing brief to present argument and effectively respond to Petitioner's claim that her answer sheet was misidentified.

Even if Exhibit 4 is Petitioner's answer sheet, the Administrative Law Judge is persuaded that the County incorrectly reduced her score from 16 to 9 when it converted the assessment rating to a 100-point scale. Some of the 8 questions answered on Exhibit 4 had to be valued at more than one point in order to achieve a raw score of 16. Given this, the conversion of Petitioner's score from 16 to 9 cannot be logically explained or supported. It is simply untenable for Petitioner's score to be reduced to 9 from 16 when adapted to a 100-point rating system. It is more likely that a score of 16 out of 47 questions would have yielded a score of about 34 (a straight arithmetic projection) when converted to a 100-point scale.^[36] Given the record and absent a more detailed, credible justification, the County's reduction in this score was improper and violated the requirement that political subdivisions adapt their hiring processes to a 100-point rating system to enable uniform allocation of veterans preference points.^[37] While the County is free to administer any type of evaluation it wants, it is required to base it on criteria capable of being reduced to a 100-point rating system.^[38] Based on the evidence in this matter, the County's conversion of its evaluation to a 100-point rating system was flawed and resulted in an incorrect score. The County's system for applying Veterans Preference points actually may have decreased Petitioner's chance that she would receive an interview.^[39] Such a perverse result is contrary to the purpose of the Act.

Petitioner also argues that the County failed to follow Minnesota Rule part 3900.4500, which requires the Commissioner of Employee Relations to assign 70 as the minimum passing score for numerical rating procedures. This rule applies to the Minnesota Department of Employee Relations and state employment and is not applicable to the County. Instead, the County's personnel system is governed by Minn. Stat. §§ 383D.21 to 383D.23. Because the County is not subject to Rule 3900.4500, it did not violate the Veterans Preference Act by failing to implement an evaluation system with 70 as a passing score. The County also did not violate Minn. Stat. § 43A.11, subd. 9 (2000) by failing to notify Petitioner of the reasons for rejecting her for employment. As the March 14, 2001 letter^[40] to Petitioner makes clear, Petitioner's name was placed

on an eligibility list for future Office Assistant and Senior Office Assistant positions. Although Petitioner's low score, if left to stand, makes it unlikely that she will be interviewed for any future positions, she was not rejected for a position. Consequently, the County was not required to comply with Minn. Stat. § 43A.11, subd. 9 and notify Petitioner in writing of reasons for her rejection.

Petitioner further argues that the County wrongly deemed her as not meeting the minimum qualifications for the Office Specialist and Administrative Assistant positions. Petitioner maintains that based on her GED and employment experience, the County should reclassify her as qualified for all four office support positions. The County argues that Petitioner has failed to show on her employment application that she has two years experience of working directly with the public as required for the Office Specialist and Administrative Assistant positions. Whether Petitioner meets the minimum qualifications for a particular position based on her past employment experience is an issue that is outside the scope of this hearing and the jurisdiction of the Administrative Law Judge and the Commissioner of Veterans Affairs in this matter.

Finally, the Petitioner argues that she is entitled to attorney's fees. The general rule is that attorney's fees are not allowed in civil actions unless authorized by statute.^[41] The legislature has not authorized the recovery of attorney's fees in the Veterans Preference Act.^[42] And while Minnesota Rule 1400.8401 authorizes an award of attorney's fees and costs to a prevailing party in contested case hearings pursuant to the Equal Access to Justice Act^[43], recovery is available only against the state. The term "state" is defined not to include counties or other political subdivisions^[44]. Accordingly, the ALJ recommends that the Petitioner's request for attorney's fees be denied.

Based on all of the evidence presented, the Administrative Law Judge concludes that the County denied Petitioner her rights under the Veterans Preference Act by failing to notify her of her final examination ratings in violation of Minn. Stat. § 43A.11, subd. 8 (2000). The County further violated Petitioner's veterans preference rights by failing to properly adapt her score to a 100-point rating system. The County scored the wrong answer sheet as Petitioner's and it incorrectly reduced Petitioner's score when converting it to a 100-point scale. The ALJ recommends that the Commissioner of Veterans Affairs issue an order requiring the County to retest Petitioner for office support positions and review its conversion program to ensure the accurate conversion of exam scores for proper allocation of veterans preference credit.

R.C.L.

^[1] Ex. 1.

^[2] Ex. 2.

^[3] Id.

^[4] Ex. 3.

^[5] Testimony of Harris.

^[6] Id.

^[7] Testimony of Winter.

^[8] Id.

[9] Ex. 1.
[10] Testimony of Harris.
[11] Testimony of Angeles.
[12] Ex. 4.
[13] Testimony of Harris and Winter.
[14] Testimony of Harris.
[15] Testimony of Harris.
[16] Testimony of Harris.
[17] Id.
[18] Ex. 5.
[19] Testimony of Harris.
[20] Testimony of Winter.
[21] Testimony of Winter and Harris.
[22] Id.
[23] Ex. 7.
[24] Testimony of Harris and Winter.
[25] Testimony of Winter.
[26] Ex. 18.
[27] Testimony of Winter.
[28] Testimony of Winter.
[29] Minn. Rules 1400.7300, subp. 5 (1999).
[30] Minn. Stat. § 197.455 (2000).
[31] Hall v. City of Champlin, 463 N.W.2d 502, 505-506 (Minn. 1990).
[32] Minn. Stat. § 43A.11, subds. 3 and 4 (2000).
[33] Minn. Stat. § 43A.11, subd. 6 (2000).
[34] Testimony of Harris; County's brief at 10.
[35] Minn. Rule 1400.5600, subp. 5 (2001).
[36] Adding 10 preference points to 34 (44), arguably places the Petitioner well within the County's "Well Qualified" category.
[37] Hall v. City of Champlin, 463 N.W.2d 502, 505-506 (Minn. 1990).
[38] Id.
[39] See, McAfee v. Department of Revenue, 514 N.W.2d 301, 305 (Minn. App. 1994) rev. denied (Minn. April 19, 1994).
[40] Ex. 5.
[41] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Osborne v. Chapman, 574 N.W.2d 64 (Minn. 1998).
[42] Independent School Dist. No. 709, Duluth v. State, Com'r of Veterans Affairs, (unpublished) WL 46559 (Minn. App. 1991).
[43] Minn. Stat. §§ 15.471 – 15.474 (2000).
[44] Minn. Stat. § 15.471. See, City of Mankato v. Mahoney, 542 N.W.2d 689 (Minn. App. 1996) (Landlord not entitled to attorney fees under Minnesota Equal Access to Justice Act in action challenging municipality's decision to revoke his rental license since municipality was not equivalent of "state" within meaning of the Act, and city council did not have state-wide jurisdiction to be considered state agency under Minnesota Administrative Procedure Act.)